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No. 93-1782

In the Supreme Court of the United States

OCTOBER TERM, 1994

RHETTA B. SWEENEY, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. 1823(e) (Supp. IV 1992) and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), apply to bar petitioners' claims under a Massachusetts consumer protection statute against a failed depository institution and its wholly owned subsidiaries.

2. Whether the court of appeals correctly upheld removal of this case by the RTC to the local federal district court under the general federal removal statute, 28 U.S.C. 1441(a), rather than under the special removal provisions of 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), as in effect at the time of removal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 16 F.3d 1. The opinion of the district court on the merits (Pet. App. B1-B7) is unreported. The opinion of the district court on petitioners' motion to remand the case to state court (Pet. App. C1-C5) is reported at 765 F. Supp. 33.

JURISDICTION

The judgment of the court of appeals (Pet. App. D1) was entered on January 31, 1994. A petition for rehearing was denied on March 17, 1994. Pet. App. E1. The petition for a writ of certiorari was filed on May 2,

1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August, 1987, petitioners borrowed $1.6 million from ComFed Savings Bank. Pet. App. A2. The loan documents, which included a promissory note and two loan agreements specifying how the loan proceeds were to be disbursed, were executed a few days before another lender was scheduled to foreclose on property owned by petitioners. *Id.* at A2, F8 (¶ 27). Petitioners used a substantial portion of the loan proceeds to pay off prior liens and prevent the threatened foreclosure. *Id.* at F10 (¶ 37b).

Petitioners defaulted on the loan, and in November, 1988, ComFed Savings began its own foreclosure proceedings. Pet. App. A2. In April, 1989, petitioners filed a nine count complaint in Massachusetts state court against ComFed Savings and its wholly owned subsidiaries ComFed Mortgage Advisory Company and ComFed Mortgage Company (collectively, ComFed), and against an employee of ComFed Mortgage. *Ibid.* The complaint alleged (see *id.* at F37-F43) breach of contract, fraud, breach of fiduciary duty, interference with advantageous business relations, intentional infliction of emotional distress, and violation of a state statute that prohibits "[u]nfair methods of competition and unfair or deceptive practices in the conduct of any trade or commerce." Mass. Gen. L. ch. 93A, § 2(a) (1984). ComFed filed a counterclaim against petitioners for failure to repay the note. Pet. App. A2.

In early 1990, the state court conducted a twelve-day jury trial of most of petitioners' claims and ComFed's counterclaim, reserving for itself consideration of petitioners' claims for specific performance and for

violation of the state consumer fraud statute. Pet. App. A2-A3. In March of that year the jury awarded ComFed $2,069,586.33 for petitioners' breach of the note. The jury awarded petitioner Rhetta Sweeney $65,000 for intentional infliction of emotional distress, but found for respondents on petitioners' claims of breach of contract, fraud, and interference with advantageous relations.[1] *Ibid.* The state court withheld entry of judgment on the jury's verdict pending the court's ruling on petitioners' remaining claims. *Id.* at A3.

2. On December 13, 1990, the Office of Thrift Supervision appointed respondent Resolution Trust Corporation (RTC) conservator of ComFed.[2] Pet. App. A3, G1. On January 11, 1991, the RTC was substituted for ComFed in the state court action, and immediately removed the case to the United States District Court for the District of Massachusetts. Pet. App. A3; *id.* at H1-H3, I1-I3. On January 30, 1991, 19 days after removal, the state court purported to enter findings and rulings on the remaining counts of petitioners' complaint (those tried to the court rather than to the jury). *Id.* at A3.

On March 1, 1991, petitioners moved to remand the case to the state court. Pet. App. A3-A4. The district court denied that motion (which petitioners renewed on two later occasions), holding that petitioners' objection related to venue rather than jurisdiction, and that it was untimely because it was made more than 30 days after

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[1] Petitioners waived two counts (which alleged breach of fiduciary duties) before the case was submitted to the jury. Pet. App. B2 n.2.

[2] The RTC was subsequently appointed receiver of ComFed and of ComFed Savings Bank, F.A., to which many of ComFed's assets were transferred as part of the reorganization following ComFed's failure. See Pet. App. A3 n.1.

removal. *Id.* at C4-C5. The court subsequently entered judgment in accordance with the state jury's verdict, but ruled that once the case had been removed to federal court, the state court had no further authority to decide the counts that had not been tried to the jury. *Id.* at B4. After briefing and argument, the district court granted summary judgment to the RTC on those counts. *Id.* at B1-B7.

3. The court of appeals affirmed. Pet. App. A1-A12. The court first rejected (*id.* at A4-A6 & n.4) petitioners' contention that the case should have been remanded to the state trial court on venue grounds. Even assuming, as petitioners argued, both that the special RTC removal statute then in effect (12 U.S.C. 1441a(*l*)(3) (Supp. II 1990)) provided for removal only to the District Court for the District of Columbia and that the time limit for petitioners' motion to remand should have been equitably tolled, the court held that the case was properly removed to the District Court for the District of Massachusetts under the general removal statute, 28 U.S.C. 1441(a). Pet. App. A5-A6.

In addition, the court upheld the district court's decision, after removal, to enter judgment in accordance with the jury's verdict on those counts that were tried to the jury, but not to adopt the state court's purported judgment on petitioners' remaining claims. Pet. App. A6, A9-A10. Because removal completely terminated the state court's jurisdiction over the case, that court's purported post-removal judgment was void. *Id.* at A6. And because the district court resolved the remaining claims against petitioners "as a matter of law and on the basis of federal defenses which arose only after the trial," the fact that those claims were not resolved by the same court that heard the evidence at trial caused no prejudice to petitioners. *Id.* at A10.

On the merits of petitioners' state consumer fraud claim, the court of appeals noted that petitioners' "principal claim" was that "the closing loan documents * * * led [petitioners] to understand that ComFed would provide them with construction financing in addition to the $1,600,000 loan actually provided." Pet. App. A7. Because that claim was "premised on an unwritten agreement" by the bank to provide additional financing (*ibid.*), the court determined that it was barred by the doctrine that any collateral agreement tending to diminish the value of a failed thrift's assets may not be asserted against the RTC unless it is in writing (and meets various other requirements). *Ibid.*, citing 12 U.S.C. 1823(e) (Supp. IV 1992) and *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942); see also 12 U.S.C. 1821(d)(9)(A) (Supp. IV 1992). The court also rejected (Pet. App. A9) petitioners' contention that ComFed's alleged violation of its own loan-to-value ratio limitations, and hence of 12 C.F.R. 545.32 (1992), in connection with their loan violated the state consumer fraud statute. Noting that Section 545.32 was intended to protect depositors, federal deposit insurance funds, and taxpayers, not consumers of bank loans, the court found "no authority" for the proposition that petitioners' allegations stated a claim under state law. Pet. App. A9.

The court of appeals considered and rejected a variety of other claims raised by petitioners. Pet. App. A11. The court also upheld the district court's decision granting the RTC's request, under Fed. R. Civ. P. 11, for attorneys' fees incurred in connection with responding to petitioners' third motion to remand the case to state court.[3] Pet. App. A12.

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[3] We are informed that on July 14, 1994, petitioner Rhetta Sweeney filed a petition for bankruptcy in the United States

ARGUMENT

1. Petitioners contend (Pet. 11-13) that the court of appeals' decision affirming summary judgment on their state-law consumer fraud claim conflicts with decisions of the Fifth, Eighth and Eleventh Circuits. Those decisions hold that 12 U.S.C. 1823(e) (Supp. IV 1992) and the doctrine of *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), do not bar tort actions against the RTC (or FDIC), as receiver, when the tort claim is "wholly independent of any agreement" between the claimant and the failed institution, or otherwise unrelated to the institution's regular banking transactions. *Hanson* v. *FDIC*, 13 F.3d 1247, 1252 (8th Cir. 1994); see also *Garrett* v. *Commonwealth Mortgage Co.*, 938 F.2d 591, 594-595 (5th Cir. 1991); *Vernon* v. *FDIC*, 981 F.2d 1230, 1233-1234 (11th Cir. 1993). The court of appeals determined, however, that petitioners' claim under Mass. Gen. L. ch. 93A was "premised on an unwritten agreement" by ComFed to provide petitioners with construction financing in addition to the $1.6 million loan, made in the ordinary course of business, on which petitioners ultimately defaulted.[4] Pet. App. A7-A8. The court's rejection of petitioners' claim on that basis represents a routine

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Bankruptcy Court for the District of Massachusetts (No. 94-14,683). The automatic stay imposed by that petition, see 11 U.S.C. 362 (1988 & Supp. IV 1992), does not affect proceedings in this case because this action is one brought by, rather than against, the debtor. See *Martin-Trigona* v. *Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577-578 (7th Cir. 1989).

[4] The court also rejected (Pet. App. A8-A9) the argument that ComFed's alleged violation of its own loan-to-value limitations, and therefore of 12 C.F.R. 545.32 (1992), stated a cause of action for consumer fraud under Mass. Gen. L. ch. 93A. Petitioners do not renew that argument in this Court.

application of Section 1823(e) and *D'Oench, Duhme*, and does not conflict with the decisions cited by petitioners.

Petitioners argue (Pet. 9-10) that their claim under Mass. Gen. L. ch. 93A "do[es] not turn on the validity of any agreement with the insured depository institution," but rather "allege[s] other wrongful conduct" by ComFed amounting to a state statutory tort, independent of "any agreement, written or otherwise," between petitioners and ComFed. That argument is inconsistent with the emphasis petitioners placed in the courts below on the alleged existence of an explicit agreement by ComFed to provide construction financing. See, *e.g.*, Pet. App. F9 (¶ 29), F12-F13 (¶¶ 44-45), F16 (¶ 63), F21 (¶ 89), F37-F42 (complaint); Pls. Opp. to Mot. to Dismiss (Mass. Super. Ct.) 3 ("The Verified Complaint clearly alleges that the boilerplate in Comfed's loan documentation did not reflect the complete agreement of the parties to fully fund construction after subdivision of the lots."), 5 ("The Plaintiffs' claims thus involve a contract which failed to include all the terms of the parties' agreement."), 10-11 ("the 'future promise' [to provide construction financing] * * * was not future or contingent at all, but rather an integral part of the parties' overall deal"); Pls. Mem. of Law in Opp. to RTC's Mot. for Entry of Judgment, etc. (D. Mass.) 15, 16 ("The Construction Loan documents themselves evidence the *written agreements* between the parties to provide future construction financing."), 18; Pet. C.A. Br. 52 ("The 'Loan Agreement' and 'Construction Loan Agreement' on their face * * * bespeak a clear promise to advance construction funding."); see also Pet. 11 n.1. In any event, a central purpose of 12 U.S.C. 1823(e) and *D'Oench, Duhme* is to protect federal deposit insurers from latent claims that arise out of an institution's loan activities and impair the value of its portfolio, but are not

apparent from the relevant documentation maintained in the institution's records. See, *e.g.*, *Langley* v. *FDIC*, 484 U.S. 86, 91-93 (1987). The court of appeals' determination (Pet. App. A7-A9) that petitioners' state statutory claim came within the scope of that protection was reasonable, and merits no further review.[5]

The determination that petitioners' consumer fraud claim was "premised on an unwritten agreement" (see Pet. App. A7) for purposes of analysis under Section

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[5] Petitioners' contentions in the lower courts (and perhaps in this Court, see Pet. 11 n.1) might be construed as alternative arguments: ComFed agreed to provide additional construction financing, but if it did not, then it misled petitioners into thinking that it would. That is not the most natural reading of petitioners' complaint, which is phrased in cumulative rather than alternative terms. Pet. App. F42 (¶¶ 188-189). Even so construed, however, petitioners' argument amounts to no more than a claim of fraud in the inducement (compare *id.* at F39 (¶ 173)), which is plainly barred under Section 1823(e). *Langley*, 484 U.S. at 93-94. Petitioners have abandoned, in this Court, their previous contention (Pet. C.A. Br. 38-40) that the conduct underlying their consumer fraud claim constituted "fraud in the factum," which *Langley* suggests (484 U.S. at 93-94) might defeat application of Section 1823(e). Indeed, the petition stresses (at 10, 15) the validity and enforceability of the $1.6 million loan. Petitioners now advocate a result under which they would repay the loan, but the repayment would be more than offset by the proceeds of a fraud judgment against ComFed. That fraud judgment would be based on alleged misrepresentations of ComFed's intent to enter into exactly the same sort of side agreement to provide further financing that petitioners now concede (*ibid.*) could not be enforced unless it met the requirements of Section 1823(e) and *D'Oench, Duhme.* The practical distinction between that result and a prohibited "impairment" of the the $1.6 million loan is elusive at best. Compare 12 U.S.C. 1821(d)(9)(A) (Supp. IV 1992) (extending terms of Section 1823(e) to affirmative claims against the RTC as receiver); *Kilpatrick* v. *Riddle*, 907 F.2d 1523, 1528 (5th Cir. 1990) cert. denied, 498 U.S. 1083 (1991).

1823(e) and *D'Oench, Duhme* also disposes of the contention that the decision below conflicts with other appellate decisions. Petitioners first cite (Pet. 11-12) *Astrup* v. *Midwest Federal Sav. Bank*, 886 F.2d 1057 (8th Cir. 1989), which upheld a judgment for breach of fiduciary duty against a subsidiary of a failed thrift. As its subsequent cases have made clear, however, the Eighth Circuit agrees with the court below that such claims are barred when they are based on asserted side agreements. *Hanson* v. *FDIC*, 13 F.3d 1247, 1251-1252 (1994) ("actions sounding in tort but based upon unwritten or secret agreements between the parties are barred"); *Oliver* v. *RTC*, 955 F.2d 583, 586 (1992). Both *Hanson* and *Oliver*, like the decision below (Pet. App. A7), rely in that regard on the First Circuit's prior decision in *Timberland Design* v. *First Service Bank for Sav.*, 932 F.2d 46 (1991). There is accordingly no conflict as to the legal analysis applicable to claims such as that advanced here by petitioners: so long as they arise from "unwritten or secret agreements," real or alleged, between the parties, they are barred under 12 U.S.C. 1823(e) and *D'Oench, Duhme*.

Similarly, in *Garrett* v. *Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 595 (1991), the Fifth Circuit held that "neither section 1823(e) nor the *D'Oench, Duhme* doctrine prevents plaintiffs from asserting affirmative claims or defenses *that do not depend on agreements*," but at the same time made clear that "if a claim is based on an agreement, that agreement must meet the requirements of section 1823(e)" (emphasis added). *Garrett* arose in the context of a motion to dismiss, and the court concluded that the pleadings on their face did not indicate that the plaintiffs' claims were "necessarily" barred, because it was not clear that those claims could only be based on the

agreements underlying the plaintiffs' loan. *Ibid.* Nothing in that holding, which returned the case to the district court for further consideration of whether the plaintiffs' claims were barred, conflicts with the analysis or holding of the court of appeals in this case.[6]

Finally, petitioners cite (Pet. 13) *Vernon* v. *FDIC*, 981 F.2d 1230 (11th Cir. 1993). *Vernon* and its predecessor, *Vernon* v. *RTC*, 907 F.2d 1101 (11th Cir. 1990), involved claims for securities fraud related to the stock of a failed thrift. In allowing those claims to go forward, the decisions focused on the fact that they did not relate to specific assets or banking transactions of the failed institution, and held that federal law did not bar "free standing tort claims that are not *related to a specific asset* acquired by the [federal insurer]." 981 F.2d at 1233-1234 (emphasis added); see 907 F.2d at 1107-1108. That limited holding was recently confirmed in *OPS Shopping Center, Inc.* v. *FDIC*, 992 F.2d 306, 310 (1993), in which the Eleventh Circuit declined to read *Vernon* expansively to exclude claims related to a specific banking transaction from the protection of Section 1823(e) and *D'Oench, Duhme* because the letter of credit involved created a liability, rather than an asset, of the failed bank. *OPS* distinguished (992 F.2d at 310-311) "free standing" claims involving employment discrimination, a car accident occurring in the scope of employment, or transactions in the institution's own stock (as in *Vernon*) from "claims which relate directly

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[6] The Fifth Circuit has held that claims similar to those in this case were barred under Section 1823(e) and *D'Oench, Duhme*. See, *e.g.*, *Clay* v. *FDIC*, 934 F.2d 69 (1991) (breach of fiduciary duty); *Beighley* v. *FDIC*, 868 F.2d 776, 784 & n.12 (1989) (fraud, breach of fiduciary duty, and promissory estoppel).

to regular banking transactions and which should be reflected in the records of regular banking transactions."

As noted above (see pages 7-8 & n.5, *supra*), petitioners' "consumer fraud" claim depends entirely on either the content of or the negotiations leading up to a particular loan transaction. Petitioner's characterization of their claim as a "free standing" tort claim within the meaning of *Vernon* and *OPS* is therefore incorrect. The court of appeals concluded instead (Pet. App. A7-A8) that petitioners' claim depended on proof of an agreement between petitioners and ComFed with respect to the terms of a routine real estate loan transaction. The decision below is therefore consistent with those of the Eleventh Circuit, and the court of appeals' resolution of the issue merits no further review.[7]

2. Petitioners argue perfunctorily (Pet. 16-17) that summary judgment based on the protections of 12 U.S.C. 1823(e) and *D'Oench, Duhme* was improper as to claims against ComFed Mortgage Company and ComFed Advisory Company, two wholly owned subsidiaries of the failed ComFed Savings. The lower courts have, however, uniformly extended those protections to wholly owned subsidiaries of failed depository institutions. See, *e.g.*,

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[7] The final footnote in the second *Vernon* opinion suggests the existence of a conflict among the courts of appeals on the issue of how closely a claim must relate to a "specific asset" of the failed institution before it will be barred under Section 1823(e) and *D'Oench, Duhme*. See 981 F.2d at 1234 n.8. *OPS*'s clarification (992 F.2d at 310) of the holding in *Vernon* limits the potential scope of any such conflict. In any event, as discussed in the text, the claims involved in this case involve an alleged unwritten agreement (an issue neither presented nor discussed in *Vernon*), and are closely related to a specific asset arising out of an ordinary banking transaction.

Oliver v. *RTC*, 955 F.2d 583, 585-586 (8th Cir. 1992); *Victor Hotel Corp.* v. *FCA Mortgage Corp.*, 928 F.2d 1077, 1083 (11th Cir. 1991); *Astrup* v. *Midwest Federal Sav. Bank*, 886 F.2d at 1058-1059; *Glenborough New Mexico Assocs.* v. *RTC*, 802 F. Supp. 387, 394-395 (D.N.M. 1992); *Becherer* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 799 F. Supp. 755, 773 (E.D. Mich. 1992); see also *Sunchase Apts.* v. *Sunbelt Serv. Corp.*, 596 So. 2d 119, 126 (Fla. Dist. Ct. App. 1992). That result does not depend, as petitioners suggest (Pet. 17), on whether a federal agency has become a successor in interest to the subsidiary.[8] A wholly owned subsidiary is, instead, an "asset" of a failed institution, and in evaluating that asset as it appears on the books of the institution, banking authorities must be able to rely on the accuracy and completeness of the subsidiary's books and records as much as on those of the parent. The terms and purposes of Section 1823(e) (relating to agreements that tend to "diminish or defeat the interest of the [RTC] in any asset") and *D'Oench, Duhme* therefore apply equally to alleged agreements with subsidiaries of failed institutions.[9]

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[8] The RTC as receiver or conservator becomes the successor-in-interest to a failed depository institution as a matter of law. 12 U.S.C. 1821(d)(2) (Supp. IV 1992). The RTC does not generally become a successor in interest to subsidiaries of the failed institution, which continue to have a separate legal existence.

[9] Petitioners misstate the facts of *Victor Hotel Corp.* v. *FCA Mortgage Corp.*, *supra*. In *Victor Hotel* both the federal agency involved and, subsequently, a new bank created by the agency became successors in interest to the failed thrift. It is clear from the court's discussion (928 F.2d at 1083) that neither the agency nor the new bank became a direct successor in interest to the wholly owned subsidiary involved in the case. The court noted (*ibid.*) that protection against side agreements "extends to suc-

3. Finally, petitioners contend (Pet. 17-19) that the court of appeals erred in holding (Pet. App. A4-A6) that removal of this case to the District Court for the District of Massachusetts was proper under the general removal provisions of 28 U.S.C. 1441(a). Petitioners argue (Pet. 18-19) that the RTC was authorized to remove this case only under 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), and that under that provision, as in effect at the time of removal, the only permissible federal forum was the District Court for the District of Columbia.[10] The courts that have expressly addressed that argument have, however, rejected it, agreeing instead with the court below that the removal provisions of 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990) supplement, rather than replace, those of 28 U.S.C. 1441(a). See *Hellon & Assocs.* v. *Phoenix Resort Corp.*, 958 F.2d 295, 298 (9th Cir. 1992); *RTC* v. *Lightfoot*, 938 F.2d 65, 68 (7th Cir. 1991); *RTC* v. *Sloan*, 775 F. Supp. 326, 331 (E.D. Ark. 1991); *Montalvo Santiago* v. *RTC*, 779 F. Supp. 632, 636 (D.P.R. 1991).

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cessors in interest to the [federal agency]," and then held without qualification (*id.* at 1083-1084) that it extends also to subsidiaries of insured institutions, whether their stock is held by the federal agency itself or by the *agency's* successor in interest.

[10] Petitioners state (Pet. 18) that the court of appeals "agreed" that, under 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990), venue was proper only in the District of Columbia. That court in fact only "grant[ed] *arguendo*" (Pet. App. A5) that venue in the District of Massachusetts was improper (and that the filing date for petitioners' otherwise untimely motion to remand should be equitably tolled), preferring to rest its judgment against peti-tioners on other grounds. Indeed, as the district court held (*id.* at C3-C5), petitioners' motion to remand for non-compliance with Section 1441a(*l*)(3) was untimely. That separate and prior ground for affirmance of the judgment below could make it unnecessary to reach the question presented by petitioners, and counsels against further review.

Petitioners contend (Pet. 18) that the decision in *RTC v. Westgate Partners, Ltd.*, 937 F.2d 526 (10th Cir. 1991), conflicts with the decisions of the other courts of appeals on this issue. *Westgate* held that 12 U.S.C. 1441a(*l*)(3) provided for removal only to the District Court for the District of Columbia. The *Westgate* court did not, however, consider the relationship between Section 1441a(*l*)(3) (Supp. II 1990) and 28 U.S.C. 1441(a), or consider whether removal might have been appropriate under the latter provision. Indeed, the *Westgate* court mentioned Section 1441(a) only to note that it "should not be confused" with the separate statute discussed in its decision. 937 F.2d at 528 n.3. *Westgate* thus did not address the provision on which the judgment below was based, and there is no conflict between the two decisions.

In any event, any conflict that might have existed as to the interpretation of 12 U.S.C. 1441a(*l*)(3) (Supp. II 1990) has been resolved by Congress in favor of the interpretation adopted by the court below. Effective February 1, 1992, Section 1441a(*l*)(3) explicitly authorizes removal by the RTC "to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending." See Pet. 3. The question presented by petitioners is therefore of no continuing importance, and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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